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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

SENADA NDREKA,

Petitioner,

v.

MICHAEL MUKASEY, UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner, Senada Ndreka asks that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit, so that this Honorable Court may settle the definition of the term "Particular Social Group" under INA § 101(a)(42).

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CITATION TO OPINIONS BELOW

The decision of the United States Court of Appeals for the First Circuit, *Nedreka v. Mukasey*, Docket No., 07-2019, is attached to this petition as **Appendix A & B**. The agency opinion issued by the Board of Immigration Appeals, *In re Senada Ndreka*, No. A 98 166 821 (BIA June 06, 2007), is attached hereto as **Appendix C**. The decision of the Immigration Judge dated February 2, 2006 is attached hereto as **Appendix D**.

STATEMENT OF JURISDICTION

The Court of Appeals for the First Circuit entered its judgment denying the timely submitted petition for rehearing on May 14, 2008. The mandate was subsequently issued by the First Circuit on May 19, 2008. **Appendix A**. The Court of Appeals denied Mrs. Ndreka's timely petition for review of the decision of the Board of Immigration Appeals on March 14, 2008. The order denying review of the agency appeal is attached hereto as **Appendix B**. This Honorable Court's jurisdiction is hereby invoked pursuant to 28 U.S.C. §1254, as the decisions below served to deprive Mrs. Ndreka of her rights as granted under the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Central to the matter *sub judice* are the Fifth Amendment rights granted to aliens seeking relief from the Courts of the United States, which Amendment states, in pertinent part, that "No

person...shall be deprived of life, liberty, or property, without due process of law."

I. STATEMENT OF THE CASE

The gravamen of the instant petition lies in the Courts of Appeals' inconsistent use and treatment of gender as a social group for the purpose of a grant of asylum. Such inconsistency is evident in the Court of Appeals for the First Circuit's decision in the matter at bar, which decision is in contravention of its own precedent. The Court of Appeals' decision is therefore arbitrary, capricious, and a clear violation of Mrs. Ndreka's Fifth Amendment rights. The decision below also exposes Mrs. Ndreka to the likelihood of abduction and forced conscription into the sex trade if she is returned to Albania, a violation of the Eighth Amendment. A concise statement of the case's history and underlying facts is herein provided so as to set forth the grave repercussions of the decision below.

Petitioner appeared before the Honorable Francis L. Cramer for a hearing on the merits of her applications. On February 2, 2006, the IJ denied Petitioner's request for asylum pursuant to §208 of the Immigration and Nationality Act (hereinafter "INA"), withholding of removal pursuant to INA § 241(b)(3), and withholding of removal under Article III of the Convention Against Torture. *See* **Appendix D** Petitioner appealed the IJ's decision to the BIA. Through an order dated June 06, 2007, the BIA affirmed the IJ's opinion, thereby dismissing Petitioner's appeal. *See* **Appendix C**.

Petitioner subsequently appealed the BIA's decision to Court of Appeals for the First Circuit. Petitioner argued that she merited a grant of asylum as she qualified as a refugee within the meaning of Section 101(a)(42) of the Immigration and Naturalization Act. *See* INA §101(a)(42). On March 14, 2008, the Court of Appeals for the First Circuit denied Petitioner's appeal for review of the BIA's decision. *See* **Appendix B**. Petitioner then filed a Petition for Rehearing with the Court of Appeals for the First Circuit, which denied her Petition on May 19, 2008. *See* **Appendix A**.

II. SUMMARY OF THE ARGUMENT

Mrs. Ndreka hereby asserts that the Court of Appeals for the First Circuit, in contravention of its own precedent, violated her Fifth Amendment rights to due process of law by denying her Petitions for Review and Rehearing. Petitioner credibly testified as to repeated attempts at abduction on her person and submitted United States Department of State Country Reports for Albania detailing Albania's long, unchecked, well-documented history of human trafficking. Despite these factors the First Circuit departed from its own precedent and those of its sister circuits, in finding that she was not eligible for a grant of asylum as a member of a social group who possessed a well-founded fear or future persecution.

Further, as demonstrated below, the Circuit Courts have neither a consistent definition or test for determining who is considered a member of a "particular social group."

III. ARGUMENT IN SUPPORT OF PETITION

A. The First Circuit Court Of Appeals' Decision to Deny Petitioner a Grant Of Asylum Based on her Membership in a Particular Social Group is in Conflict with Other Circuits.

1. The Court of Appeals for the First Circuit Abrogated Petitioner's Rights by Denying her Claims for Asylum Despite Petitioner's Well-Founded Fear of Persecution Based on her Membership in a Particular Social Group.

This Court should review the decision of the First Circuit because Petitioner possesses a well founded fear that she will be abducted and sold into the sex trade if returned to Albania. To be eligible for a grant of asylum, an alien must first show that he or she is a "refugee" within the meaning of Section 101(a)(42) of the Immigration and Naturalization Act. *See* INA §101(a)(42). To make this showing, an alien must prove that he or she is either unable or unwilling to return to his or her country based upon past persecution suffered or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *See Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004).

"Persecution," as employed in the statute, has been defined by the Board of Immigration Appeals and generally accepted by the United States Circuit Courts

of Appeals as meaning "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded offensive." *See Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985); *Li v. Attorney General of the U.S.*, 400 F.3d 157 (3d Cir. 2005); *Montoya-Ulloa v. INS*, 79 F.3d 930 (9th Cir. 1996); *Guevara-Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986).

For the harm or suffering to be considered persecution it must be inflicted either by the government or by persons or organizations the government is unable or unwilling to control. *Pavlova v. INS*, 441 F.3d 82, 91-92 (2d Cir. 2006) [Reversed IJ who required that applicant show persecution by the government despite her demonstrating that the Russian government was unwilling to control the RNU's religiously motivated persecution of Baptists]; *Fiadjoe v. Attorney General of the U.S.*, 411 F.3d 135, 160-63 (3d Cir. 2005) [Reversed BIA's denial of asylum in case involving woman who was sexually and emotionally abused by her father who was priest in Trokosi sect in Ghana where DOS country report indicated that it would have been futile for the applicant to go to police in regard to slave practices of Trokosi sect which are not prosecuted by the government].

"Membership in a particular social group as defined by the BIA refers to persons who hold an "immutable characteristic or common traits such as sex, color, kinship or in some cases shared past experiences such as land ownership or military service." *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985). Under the BIA's definition, it must be a characteristic that the group cannot change or should not be required to

change because it is fundamental to their identities or consciences. In *Acosta*, 19 I&N Dec. 211 (BIA 1985), the BIA found that membership in a taxi collective that was being persecuted did not constitute "membership in a particular social group" because the applicant was free to quit the group.

The U.N. Handbook defines particular social group as persons with similar backgrounds, habits or social status. *See* Handbook at ¶77. The High Commissioner's Office has also published guidelines. Unlike the BIA's view these guidelines take into consideration external factors as well as internal/immutable characteristics in determining a social group. *Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(s) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees,* U.N. Refugee Agency, U.N. Doc. HCR/GIP/02/02 (May 7, 2002). "A group of persons who share a common characteristic other than their risk of being persecuted, *or who are perceived as a group by society.* The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights." *Guidelines* at ¶11. In Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985), overruled in part on other grounds by *In re Mogharrabi,* 19 I. & N. Dec. 439 (BIA 1987), the BIA listed gender as an example of a prototypical immutable characteristic that could form the basis for a social group.

This holding has been affirmed by numerous circuits. The Ninth Circuit Court of appeals made this

finding explicit in *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005), saying:

> Although we have not previously expressly recognized females as a social group, the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application of our law. We have held "that a 'particular social group' is one united by a voluntary association . . . *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it." citing *Hernandez-Montiel* v. *INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (emphasis in original) (recognizing that persecution on account of homosexuality can constitute persecution on account of membership in a particular social group). Few would argue that sex or gender, combined with clan membership or nationality, is not an "innate characteristic," "fundamental to individual identity."

The First Circuit itself deferred to *Matter of Acosta*'s broad definition of "particular social group," stating; "[m]embership may stem from an innate characteristic or a shared experience Compare, e.g., *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993)(concluding that family membership can constitute membership in a social group), with, e.g., *Mediouni v. INS*, 314 F.3d 24, 28 (1st Cir. 2002)(concluding that past employment as a police officer could satisfy the social group

membership requirement)." *Ang v. Gonzales*, 430 F.3d 50, 55 (1st Cir. 2005). While the First Circuit does not explicitly set out a test for defining such characteristics it states that "[i]n determining what constitutes persecution on account of membership in a particular social group, the key is whether the claimed persecution is aimed at an individual because of his or her affiliation with a group of persons, all of whom share a "common, immutable characteristic." *Da Silva v. Ashcroft*, 394 F.3d 1, 5 (1st Cir. 2005). This reasoning mirrors the standard more clearly explicated by the Second Circuit in *Gao v. Gonzales,* 440 F.3d 62, 68 (2d Cir. 2006). In *Gao* the Second Circuit stated that:

> "The reasoning in *Fatin* may be taken to suggest that the proper balance to strike is to interpret "particular social group" broadly (requiring only one or more shared characteristics that are either immutable or fundamental) while interpreting "on account of" strictly (such that an applicant must prove that these characteristics are a central reason why she has been, or may be, targeted for persecution)."

The Second Circuit further adds that their decision in *Gomez v. INS,* where in the Court wrote that "possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group" is not inconsistent with the Acosta definition of "particular social group". 947 F.2d 660, 664 (2d Cir. 1991). The Second Circuit explains that "*Gomez* can reasonably be read as limited to situations in which an applicant

fails to show a *risk* of future persecution on the basis of the "particular social group" claimed, rather than as setting an *a priori* rule for which social groups are cognizable." *Gao,* 440 F.3d at 70.

Thus, the Second Circuit Court of Appeals' test for a grant of withholding of removal or of asylum based upon membership in a social group, and by extension, that of the First Circuit is as follows:

> "The alien must (1) identify a group that constitutes a "particular social group" within the interpretation just discussed, (2) establish that he or she is a member of that group, and (3) show that he or she would be persecuted or has a well-founded fear of persecution based on that membership." Id. at 67 citing *Fatin*, 12 F.3d at 1240.

Accordingly, an alien's claim for asylum must necessarily be understood within the context of the current political situation existing in such alien's native country. *Cordero-Trejo v. INS*, 40 F.3d 482, 490-91 (1st Cir. 1994) (*reversed* BIA denial of asylum where testimony and evidence not considered "in light of general conditions" in country as required by 8 C.F.R. §208.13(a)). To this end, the Board of Immigration Appeals has taken a view to requiring the inclusion of general background information about the alien applicant's native country in the record of proceedings as a foundation for the alien's claim. *See also Gramatikov v. INS,* 128 F.3d 619, 620 (7th Cir. 1997) (*criticizing* uncorroborated claims about country conditions). The Board of Immigration Appeals has asserted its reliance on the Profile of Asylum Claims

and Country Conditions reports issued by the Department of State, which are prepared pursuant to 8 C.F.R. §§208.11(a), 1208.11(a), and the United States government's view of country conditions in specific countries, and frequently regards the findings set forth in such reports as dispositive of issues pertaining to country conditions within the context of asylum/removal proceedings. *Matter of R-S-H- et al.*, 23 I&N Dec. 629, 643 (BIA 2003) (In a case involving Lebanon the Board of Immigration Appeals emphasized that the Immigration Judges and the Board frequently rely on Department of State Country Reports); *Matter of A-E-M-*, 21 I&N Dec. 1157 (BIA 1998) (*denying* asylum based on a finding of no evidence of country wide persecution pursuant to a Department of State profile for Peru stating that Sendero Luminosa has reduced ability to act and operate in only in only a few areas of Peru); *Matter of V-T-S-*, 21 I&N Dec. 792, 798-799 (BIA 1997) ("Country condition profiles described by the State Department have been found to be 'the most appropriate and perhaps best resource for information on conditions in foreign nations.'")

In keeping, the First Circuit requires that even if an petitioning alien is in fact a member of a particular social group, in order to qualify for asylum under INA §101(a)(42), he or she must demonstrate a well-founded fear of persecution. *Da Silva* 394 F.3d at 6 This is the same test the Second Circuit applied in Gao to determine if she was a member of a social group under the auspices of INA §101(a)(42):

> "Gao belongs to a particular social group that shares more than a common gender. Gao's social

> group consists of women who have been sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable... Moreover, Gao's testimony, which the IJ credited, also establishes that she might well be persecuted in China-in the form of lifelong, involuntary marriage-" on account of "her membership in this group." *Gao* 440 F.3d at 71

As the Second Circuit did not find evidence in the record demonstrating that the government was both willing and able to protect Gao, or that she could safely relocate within the country, the Court found that she possessed a well-founded fear of persecution and the denial of the BIA erroneous.

Likewise, in the instant matter, Petitioner asserts that she is eligible for a grant of asylum under the auspices of INA §101(a)(42) and that the denial of the First Circuit was in error and contrary to precedent. Petitioner alleges that she meets all three prongs of the *Gao* test.

First, Petitioner is a member of a particular social group, which possesses "immutable characteristic or common trait such as sex, color, kinship or in some cases shared past experiences", namely, young, attractive women in Albania, who have been targeted for abduction and sale. Matter of Acosta, however, does recognize that certain past experiences form the basis for protected group status under the asylum statute, and other BIA precedents have recognized such protection for some experiential-based groups

offered by asylum seekers. See, e.g., *Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (BIA 1988); *In re Fauziya Kasinga*, 21 I. & N. Dec. 357 (1996). *Hong Hong v. AG of the United States*, 165 Fed. Appx. 995, 1002 (3d Cir. 2006).

Second, Petitioner asserts that she has established her membership in this group, as her gender and nationality are clear, and she testified credibly (the immigration judge made no adverse credibility finding) about the two attempted abductions. Thirdly, Petitioner maintains that she has a well-founded fear of returning to Albania as it is likely that she will suffer a third attempt at abduction on her person. To support such a fear Petitioner points to the fact that she submitted credible documentary evidence in the form of U.S. Department of State Country Reports for Albania detailing Albania's long history of human trafficking and the government's inability to stem the tide. She also highlights the fact that, even after one unsuccessful attempt, her persecutors remained interested in capturing her and made a subsequent attempt.

Accordingly, given the Petitioner's satisfaction of the *Gao's* three prong test and the inability of the Albanian government to protect people such as Mrs. Ndreka, either via relocation within Albania or by police action, The Court of Appeals for the First Circuit erred in denying Petitioner's petition for review.

2. The Federal Circuit Courts of Appeals are not in Agreement as to the Elements Required to Establish Membership in a Particular Social Group within the Meaning of Section 101(a)(42) of the Immigration and Naturalization Act, Thus Presenting a Federal Question Reviewable by this Honorable Court.

The Circuit Courts of Appeal are sharply divided as to what approach to take regarding evaluating whether a potential refugee or asylee is in fact a member or a particular social group. As the Third Circuit said in *Hong*:

> "This statutory language itself is "not very instructive: Read in its broadest literal sense, the phrase is almost completely open-ended. Virtually any set including more than one person could be described as a "particular social group. There is no helpful evidence of legislative intent and "both courts and commentators have struggled to define" the phrase. Thus, the "contours of what constitutes a 'particular *social group*' are difficult to discern." *See also* 3 Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure* § 33.04(2)(d)(i) (rev. ed. 2005) ("Its scope has been debated, thus far inconclusively . . . . A clearer picture doubtless will be developed in case-by-case litigation."). Hong Hong v. AG of the United States, 165 Fed. Appx. 995, 997 (3d Cir. 2006). (internal citations omitted).

The First, Third, and Seventh Circuits have adopted the BIA's "immutable characteristic" approach while recognizing that there are variations in the standard in different circuits. *See, e.g., Lukwago v. Ashcroft,* 329 F.3d 157, 170-73 (3d Cir. 2003) [Adopting *Acosta* approach]; *Lwin v. INS,* 144 F.3d 505, 510-13 (7th Cir. 1998) [Same]; *Alvarez-Flores v. INS,* 909 F.2d 1, 7 (1st Cir. 1990). *See also Da Silva v. Ashcroft,* 394 F.3d 1, 4-6 (1st Cir. 2005) [Adhering to immutability whether innate or experiential as a requirement but recognizing that refugees situations "vary widely" in whistleblower case and accepting "that current or former employment status can, at least theoretically, form the linchpin for assembling a protected social group"]; *See also Ang v. Gonzales,* 430 F.3d 50, 55-56 (1st Cir. 2005) [Finding that employment at the U.S. Embassy or support for Americans can constitute social group membership because membership may stem from an "innate characteristic or shared experience"]; *but see Ahmed v. Ashcroft,* 348 F.3d 611, 6116-18 (7th Cir. 2003) [Finding in the context of a police officer who left his position that "immutability, while important, has never been the last or only word on the definition of a social group"].

The Sixth Circuit has adopted the BIA's immutable characteristic approach under *Chevron* deference standards but recognized that the BIA itself in such cases as *Matter of R-A-,* 22 I&N Dec. 906 (BIA 1999) (now withdrawn and remanded by AG to the BIA in light of future regulations, 23 I&N Dec. 694) may be moving toward recognizing external perception of a group as a factor. "In other words, society's reaction to a 'group may provide evidence in a specific case that a particular group exists, as long as the reaction by

persecutors to members of a particular social group is not the touchstone defining the group." *Castellano-Chacon v. INS*, 341 F.3d 533, 548 (6th Cir. 2003).

The Eighth and Ninth Circuits have defined a particular social group as one "in which the members are 'united by a voluntary association *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.'" *Tchoukhrova v. Gonzales*, 404 F.3d 1181, 1188 (9th Cir. 2005) [Disabled children and their parents who provide care for them are a social group]; *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000). *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994) [Although all Iranian women could not be a social group, Iranian women who advocate women's rights could be]. As demonstrated above, Second Circuit has adopted the "voluntary associational relationship" standard as well, but, noted that the members of a social group must be externally distinguishable. *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991); *Saleh v. DOJ*, 962 F.2d 234, 240 (2d Cir. 1992). *See also Gao v. Gonzales*, 440 F.3d 62, 66-70 (2d Cir. 2006) [Relying on a broad interpretation of *Matter of Acosta*, distinguishing *Gomez*, and finding that women subject to forced marriage in China is a social group].

In Sanchez-Trujillo, 801 F.2d 1571, 1574-75 (9th Cir. 1986), the court recognized four criteria for establishing social group persecution: (1) Is the group cognizable? (2) Does the alien qualify as member? (3) Has the group been targeted because of characteristics as a group? (4) Are "special circumstances" present which permit *per se* finding and which do not require

findings of individual persecution of members of group?

Similarly the Sixth Circuit has also noted that a social group may not be defined by the fact that the individuals suffer persecution but rather share a "narrowing characteristic other than their risk of being persecuted." *Rreshpja v. Gonzales,* 420 F.3d 551, 556 (6th Cir. 2005) [Young Albanian women who are forced into prostitution is not a social group].

In *Lwin v. INS,* 144 F.3d 505, 510 (7th Cir. 1998), however, the Court adopted the first two criteria above and instead maintained as a third that the person establish that his well-founded fear is based on his membership in the group. This test is the one explicated by the Second Circuit in *Gao*.

The Tenth Circuit, departing from the multi-prong tests of its sister circuit, maintains fidelity to the Board's definition in *Matter of Acosta,* stating; "[w]e are not persuaded that the BIA, contrary to the language of *Acosta*, requires more than gender plus tribal membership to identify a social group." *Niang v. Gonzales,* 422 F.3d 1187, 1198-2001 (10th Cir. 2005) [Female member of the Tukulor Fulani tribe in Senegal that practices FGM can be subject to persecution on account of membership in a particular social group because gender and tribal membership are immutable characteristics]. The Tenth Circuit therefore, simply defines a particular social group as, "common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities." *Niang* 422 F.3d at 1197.

With both the definition and evaluative process of determining a "particular social group" ambiguous, the Circuit Courts have engaged in speculation, resulting in nearly each circuit creating their own definition or test. Accordingly, this issue is ripe for review by the United States Supreme Court. Granting of Petitioner's writ would allow this Honorable Court to define a social group and solidify which is the proper method of evaluating whether an alien meets the criteria.

CONCLUSION

For the reasons set forth above, this Honorable Court should grant certiorari and schedule this matter for briefing and oral argument to ensure the opportunity for Mrs. Ndreka to have the merits of her meritorious appeal reviewed by the Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 07-2019

[Filed May 19, 2008]

SENADA NDREKA
Petitioner

v.

MICHAEL B. MUKASEY,
United States Attorney General
Respondent

ORDER OF COURT

Petitioner's petition for panel rehearing is denied.

By the Court:
/s/ Richard Cushing Donovan, Clerk

cc:
Charles Christophe
John Furlong
LaTia Bing
Briena Strippoli
Mary Jane Candaux
Jeffrey Bucholtz

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 07-2019

[Filed March 14, 2008]

SENADA NDREKA, Petitioner,

v.

MICHAEL B. MUKASEY, United States Attorney General, Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

Before
Torruella, *Circuit Judge*, Wallace,* *Senior Circuit Judge*, and Lipez, *Circuit Judge*.

Charles Christophe and *Christophe & Associates, P.C.*, on brief for Petitioner.

* Of the Ninth Circuit, Sitting by designation.

Briena L. Strippoli, Trial Attorney, Office of Immigration Litigation, *Jeffrey S. Bucholtz*, Acting Assistant Attorney General, and *Mary Jane Candaux*, Assistant Director, on brief for respondent.

Wallace, Senior Circuit Judge. Petitioner Senada Ndreka seeks review of the Board of Immigration Appeals' (Board) denial of her appeal. Substantial evidence supports the Board's decision, and we affirm. *See López de Hincapié v. Gonzales*, 494 F.3d 213, 218-220 (1st Cir. 2007).

Ndreka cannot qualify as a refugee unless she was persecuted based on a protected ground. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987); *see also* 8 U.S.C. § 1101(a)(42)(A). Although Ndreka argues she was subject to persecution based on her political opinion, substantial evidence supports the Board's determination that Ndreka was targeted by criminals interested in using her for sex trafficking and not because of her political opinion. Thus, she is not entitled to asylum relief. See 8 U.S.C. § 1158(b)(1). Because Ndreka failed to show that she was persecuted based on a protected ground for asylum eligibility purposes, she likewise fails in her application for withholding of removal. *See López de Hincapié*, 494 F.3d at 220.

Substantial evidence supports the Board's determination that Ndreka has not shown it is more likely than not that she would be tortured by or at the acquiescence of a government official upon her return to Albania, and the denial of relief under the Convention Against Torture was therefore

appropriate. *See Xue Deng Jiang v. Gonzales*, 474 F.3d 25, 32 (1st Cir. 2007).

Therefore, Ndreka's petition for review is *denied*.

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 07-2019

[Filed March 14, 2008]

SENADA NDREKA,	)
Petitioner,	)
	)
v.	)
	)
MICHAEL B. MUKASEY,	)
United States Attorney General,	)
Respondent.	)
	)

JUDGMENT

This cause came on to be submitted on a petition for review of an order of the Board of Immigration Appeals.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The petition for review is denied.

By the Court:

/s/ Richard Cushing Donovan
Richard Cushing Donovan, Clerk

[cc: Mr. Christophe, Mr. Furlong, Ms. Bing, Ms. Strippoli, Ms. Candaux, &Mr. Bucholtz.]

APPENDIX C

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk
5107 Leesburg Pike. Suite 2000
Folls Church, Virginia 22041

Lombardi, James A., Esquire
305 Broadway, Suite 700
New York, NY 10007-0000

Office of the District Counsel/BOS
P.O. Box 8728
Boston, MA 02114

Name: NDREKA, SENADA A98-166-821

Date of this notice: 06/06/2007

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ Donna Carr
Donna Carr
Chief Clerk

Enclosure

Panel Members:
HESS, FRED

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A98 166 821 - Boston Date: Jun 6, 2007

In re: SENADA *NDREKA*

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: James A. Lombardi, Esquire

ORDER:

PER CURIAM. The respondent, a native and citizen of Albania, has appealed from the Immigration Judge's decision dated February 2, 2006. The Immigration Judge found the respondent removable, denied the respondent's applications for asylum and withholding of removal, under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158 and 1231(b)(3)(1997), and denied her request for protection under the Convention Against Torture, under 8 C.F.R. §§ 1208.16 through 1208.18

(2006).[1] The respondent argues that the Immigration Judge erred in denying her relief.

This Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. ***See*** 8 C.F.R. § 1003.1(d)(3)(I) (2006). This Board reviews questions of law, discretion and judgment in an Immigration Judge's decision *de novo*. *See* 8 C.F.R. § 1003.1(d)(3)(ii) (2006).

The respondent alleges that she was persecuted on account other political opinion. She says that she was harassed and threatened by two male students when she was in her first year of high school. She said they spoke "dirty words" to her and told her that no one was going to be able to protect her. She said they were affiliated with the Socialist Party and were targeting her because she was active in the Democratic Party. The respondent married in June 2000 and did not return to school. The respondent said her husband left Albania for the United States in February 2002 after being detained two days by the police. Another incident with the same two boys occurred in June 2002. One of them called her a "big-mouth Democrat" and said that, since her husband was gone, no one was going to be able to protect her. In August 2002, one of these boys, with the help of two others, attempted to abduct her. They kept saying "dirty words" to her and telling her she was not safe.

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[1] Because the asylum application was filed prior to May 11, 2005, the provisions of the REAL ID Act of 2005 are inapplicable here. ***See Matter*** of ***S-B-***, 24 I&N Dec. 42 (BIA 2006)

They also said that they were going to take her for "dirty affairs" and forcibly traffic her. Though the respondent told her parents and teachers of some of these incidents, she never told the police about any of them.

The Immigration Judge found the respondent credible, but did not find that she had been targeted on account of her political opinion or any other protected ground. Rather, he concluded that the boys had targeted her for trafficking. *See* I.J. at 8-9.

We concur that the respondent failed to show that she was targeted - on account of a protected ground. An applicant for asylum or withholding of removal must establish that the persecution he or she suffered, or fears, is on account of his or her race, nationality, religion, membership in a particular social group, or political opinion. *See* 8 U.S.C. § 1101(a)(42)(A), 1158(b); 8 C.F.R. § 1208.16(b)(2) (2006).

It has been established by case law that those targeted for violence or crime by gangs are not members of a cognizable "particular social group." *See Abdille v. Ashcroft,* 242 F.3d 477 (3rd Cir. 2001); *Bradvica v. INS,* 128 F.3d 1009, 1013 (7th Cir. 1997). *CF. Lopez-Soto v. Ashcroft,* 383 F.3d 228 (9th Cir. 2004); *Garcia-Martinez v. Ashcroft,* 371 F.3d 1066 (9th Cir. 2004).

However, even assuming that the respondent had been targeted on account of her political opinion, the respondent failed to show that the police would not prosecute the boys for sexually harassing her, threatening her with trafficking, and attempting to

abduct her. The respondent failed to request aid from the police. *See* I.J. at 5, 8-9; Tr. at 60. Consequently, having failed to avail herself of the protection of the government, the respondent failed to show that the government was unwilling or unable to control the alleged persecutor. *See Matter of O-Z- & I-Z-*, 22 I&N Dec. 23 (BIA 1998); *Matter of Kasinga,* 21 I&N Dec. 357 (BIA 1996).

The Immigration Judge noted that, though the respondent's family were also supporters of the Democratic Party, none of them have had any problems. *See* I.J. at 6-7; Tr. at 64. Moreover, the Democratic Party is now in power in Albania. *See* I.J. at 7-8; Tr. at 63.

Consequently, we concur with the Immigration Judge that the respondent failed to prove her claims. The respondent has failed to show past persecution or a reasonable likelihood of future persecution on account of a protected ground, and is not eligible for asylum. *See INS v. Cardoza- Fonseca,* 480 U.S. 421 (1987); *Matter of Mogharrabi,* 19 I&N Dec. 439 (BIA 1987); 8 U.S.C. §§ 1101(a)(42), 1158 (1997); 8 C.F.R. § 1208.13 (2006). Likewise, she has failed to show a clear probability that her life or freedom would be threatened on account of a protected ground if returned to Albania, and is not entitled to withholding of removal. *See INS v. Stevic* 467 US. 407 (1984); 8 U.S.C. § 1231(b)(3) (1997); 8 C.F.R. § 1208.16 (2006). Similarly, she has failed to show that she more likely than not would be tortured by, or with the acquiescence of, the government. *See* 8 C.F.R. § 1208.16(c)(2) (2006).

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW IMMIGRATION COURT
Boston, Massachusetts

File A 98 166 821

[Filed February 2, 2006]

In the Matter of	)	
	)	
SENADA NDREKA,	)	IN REMOVAL
	)	PROCEEDINGS
Respondent	)	
	)	

CHARGE: Section 237 (a) (1) (A) in that the respondent, at the time of entry into the United States was not in possession of a valid entry document.

APPLICATION: Asylum; Withholding of Removal; Withholding of Removal under the Convention Against Torture.

ON BEHALF OF RESPONDENT:
Isejn Marku, Esquire

ON BEHALF OF DHS:

Susan Hiller, Esquire Department of Homeland Security, Boston, Massachusetts

ORAL DECISION OF THE IMMIGRATION JUDGE

INTRODUCTION

The respondent is a 22-year-old citizen and native of Albania. The Government has charged the respondent in the Notice to Appear in violation of the Immigration and Nationality Act as referenced above. The respondent, through counsel, has admitted the allegations and conceded the charges (see "Exhibit 2"). Accordingly, the Court finds by clear, convincing and unequivocal evidence that the respondent is removable and designates as Albania as the country of removal. The respondent has applied for relief in the form of asylum under- Section 208 of the Immigration and Nationality Acts. Application for asylum shall also be considered applications for withholding of removal under Section 241(b)(3) of the Act. The Court also considers the respondent's application for withholding of removal under the Convention Against Torture.

STATEMENT OF THE LAW

The burden of proof is on the respondent to show that she is eligible for asylum or withholding of removal. To qualify for asylum under Section 208 of the Act, the respondent must show that she is a refugee within the meaning of Section 101(a)(42)(A) of the Act. In order to meet the statutory state of eligibility for asylum, the respondent must satisfy by

clear and convincing evidence the elements in the definition of refugee created by Section 101(a) (42) (A) : The respondent must have a fear of persecution; the fear must be based on past persecution or a well founded fear of persecution in the future; persecution feared must be on account of race, religion, nationality, membership in a particular social group or political opinion; and the respondent must be unable or unwilling to return to her country of nationality because of countrywide persecution.

If the Court finds there was past persecution, then a presumption exists of a well founded fear of future persecution. The burden interests of the Government to show a change in conditions that would rebut that presumption. If the Court finds no past persecution, respondent can still get asylum based on the fear of future persecution if the respondent can show, on a subjective basis, a genuine fear, and on an objective basis that a reasonable person or response or circumstances were in fear of persecution if removed to her country of nationality.

FACTS

The respondent testified at the hearing on the merits and was the only witness to testify. Respondent has also submitted a four page type written statement in support of her application for asylum. Respondent testified that she was born on October lst, 1983 in Shjoder. Respondent lived in Shjoder until she left the United States in January of 2003.

Respondent was asked why she left Albania and she responded that it was on account of these threats

that she received from socialists. According to the respondent, the threats started when respondent was attending high school in Respondent testified that she supported the youth form of the Democratic Party and was active politically.

Respondent was asked to described what happened, and according to respondent, she was threatened by "two guys" whom she identified as Arber Krja and Emir Bushati. They allegedly assailed her for being involved in politics and told her "your family won't protect you". When asked to be specific as to the nature of the threats, respondent testified that these individuals "spoke dirty words" and repeated the assertion that her family would not be able to protect her: "You big mouth democrat. Your family won't be able to protect you." When respondent was asked as to the nature of the threat in terms of that from which she needed protection, respondent was unable to say.

According to respondent, she was not able to finish one year of high school because of these troubles. Her teachers told her that she should not continue with her "activities" which she describes as engaging with other students in demonstrations and handing out fliers. When asked about her first demonstration, she did not have a clear memory but recalled that it took place in the plaza at the "center of our city". The purpose of the demonstration was to support the Democratic Party.

Respondent describes getting married to Fred Ndreka on June 22nd, 2000. The marriage certificate is in file as 'Exhibit 8". Respondent testified that her husband left Albania in February of 2002 because the Socialists Party, the members of the Socialists Party

had "threatened his family". Respondent testified that her husband was taken to the police station where he was again threatened and where he was beaten up. However, further details as to respondent's involvement, which she had specifically observed, and the specific events relating to her husband's release and departure were not offered.

After her husband left Albania, the respondent continued to have problems. In May or June of 2002, a green sedan, again occupied by Arber Krja, followed her and from the passenger's seat respondent was verbally harassed by Mr. Krja who advised her that she was not to believe that she was safe and that he would be back. Some people came on the scene and respondent's tormentors departed. Respondent was asked whether she reported this incident to the police and she responded in the negative.

Respondent testified that she was afraid of this individual and because his family was a communist family. Thereafter, her father had to drive her back and forth to work and ultimately she had to quit her job which was a sales clerk at a grocery store, located a 20 minute walk from her home.

Respondent described one more incident which took place on August 17th, 2002 in the evening. Respondent left her home and went out to buy bread. On her return, "two guys surrounded me". Once again, one of these individuals was Mr. Krja. They tried to force her into a waiting vehicle. Respondent fought them off and screamed. Respondent's mother approached the scene since she had observed the attack from her balcony and the attackers departed.

Respondent fears that if she returns to Albania, she will be kidnaped. She fears that she is a target for trafficking if she is removed to Albania. According to respondent, Albania is still a communist state and there is no one on her side to protect her. She acknowledges that she never involved the police in her problems. Her reasoning is based on her fear of the authorities who had already arrested and assaulted her husband.

Respondent testified she now has two children, approximate ages two and three months. Since the respondent entered the United States in January of 2003, the Court assumes that these children are United States citizens.

Respondent testified that she and her family have always supported the Democratic Party and participated in Democratic Party functions. However, respondent acknowledges that she was never an official member of the Democratic Party, just active and vocal on it's behalf. She feels that there is a political motive in the threats and attacks on her by Arber Krja who is a Socialists Party supporter according to the respondent.

When asked if she fears returning to Albania, respondent testified that she does not wish to return to Albania because of terrorism and because Albania is not stable. However, she acknowledges she has family in Albania and her family have not had problems since her departure. She believes she is a target for kidnaping because she is young and female and because she is a member of the Democratic Party, while "they" are Socialists Party supporters.

On cross-examination, the respondent acknowledged that her husband's bid for asylum has been appealed to the Circuit Court of Appeals and that appeal has been dismissed. She also acknowledged that there is a removal order pending with regard to her husband but he has not left the United States. Respondent was then asked whether the real reason she wants to stay is to raise her children in the United States. Respondent answered in the affirmative.

Respondent acknowledged that her parents and her siblings are still in Albania and that her younger brother is attending high school in Albania. She is aware of no problems being experienced by her family in Albania.

Respondent was asked if her attackers were students. She answered in the affirmative. She was also asked whether the reason, whether the motives of her attackers to grab her was because she was young, pretty and female and she again answered in the affirmative. However, when asked whether the attacks really had nothing to do with the Democratic Party, respondent denied this.

Respondent acknowledged that her father is an unemployed truck driver and that her mother does not work. However, respondent denied that her real motive in coming to the United States was because there were no jobs in Albania. However, respondent concedes that she was never detained by the Albanian government nor was she ever before tortured by officials of the Albanian government.

Finally, it was pointed out to the respondent that the Democratic Party is currently in control of Albania and the president of Albania is a member of the Democratic Party. respondent testified that the state is terrorized by "criminals". Respondent acknowledged that it is the criminals she fears in Albania.

FINDINGS AND ANALYSIS

The thresholds assessment for the Court is the credibility of the respondent. With regard to the problems suffered by the respondent while in Albania, the Court finds that the respondent's testimony was credible. The trafficking of young females by Albanian criminals is a well known problem and recognized by the Secretary of State of the United States. In it's country reports on human rights practices for Albania for the year 2004, the trafficking of women and children remained a problem according to this report. The Secretary of State also acknowledges that police corruption in involvement in trafficking is also a problem. This Court acknowledges and sympathizes with the respondent's concern about returning to Albania in light of the continuing situation and the fact that the respondent is a young female who has already apparently become a target in that country.

However, in this particular case, the respondent never eluded to a belief or, any evidence, in that the police were corrupt with regard or somehow involved with regard to the attempted abduction of her person in August of 2002. Also the Court notes that the respondent did not assert that the police that she felt the police were complisit in any attacks on her person but that in general, she feared the police because of

their treatment of her husband. Nor did she point to any knowledge or her part or other evidence that she was aware of any involvement or complicity of the police with trafficking. In fact, when asked under cross-examination what she feared in Albania, respondent acknowledged that it was the "criminals".

As outlined above, the respondent must establish that she is a "refugee" to be eligible for asylum. In this same prerequisite is necessary to obtain withholding of removal. In this particular case, the respondent has not established that she is a refugee because she has failed to establish a nexus between the problems she was suffering in Albania and either race, religion, nationality, membership in a particular social group or opinion. It appears obvious from the facts that a small group of individuals, known to the respondent, had targeted her for what was an apparently a criminal enterprise on their part, and had nothing to do with her politics. The respondent has established no nexus between the problems that she suffered in Albania and any one of the five protected areas. Accordingly, the Court can not find that respondent is eligible either for asylum or withholding of removal.

In regard to withholding of removal under the Convention Against Torture, it was the respondent's burden to establish that it was more likely than not that she would be tortured if returned to Albania. Further, it was her burden to establish that this harm would be inflicted by or at the instigation of or would be consent or acquiescence of a public official or other person acting in an official capacity. There has been no evidence presented either relating to torture, or to the involvement of officials of the Albanian government in

such an activity. Therefore, the Court can not concluded, more likely than not that the respondent would be singled out for torture if she be removed to Albania. Therefore, respondent's application for withholding of removal under the Convention Against Torture is denied.

Based on the foregoing, it is therefore the Courts:

ORDER

IT IS HEREBY ORDERED that the respondent's application for asylum under Section 208 of the Act is denied.

IT IS FURTHER ORDERED that the respondent's application for withholding of removal under Section 241(b) (3) of the Act is denied.

IT IS FURTHER ORDERED that the respondent's application for withholding of removal under the Convention Against Torture is denied.

IT IS FURTHER ORDERED that the respondent be removed to Albania.

FRANCIS L. CRAMER
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before FRANCIS L. CRAMER in the matter of:

SENADA NDREKA

A 98 166 821

Boston, Massachusetts

was held as herein appears, and that this is the original transcript thereof fos the file of the Executive Office for Immigration Review.

/s/Geralene K. Logan
Geralene K. Logan (Transcriber)

Deposition. Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

September 26, 2006
(Completion Date)

AFFIRMATION OF SERVICE

I, Charles Christophe, Esq., an attorney admitted to practice law in the U.S. Court of Appeals for the Second Circuit, affirm the following under the penalties of perjury:

That on June 29, 2007, I served a true copy of the within documents on the following parties by frst class mail to the following addresses and locations:

Settlement Counsel
United States Court of Appeals
For the First Circuit
Civil Appeals Management Program
1 Courthouse Way, Suite 3440
Boston, MA 02210

Dated: June 29,2007
New York, New York

/s/Charles Christophe
Charles Christophe, Esq.

CHRISTOPHE & ASSOCIATES, P.C.
2 Wall Street, 8th Floor
New York, NY 10005
344-3800
Attorneys for Petitioner

AFFIRMATION OF SERVICE

I, Charles Christophe, Esq., an attorney admitted to practice law in the U.S. Court of Appeals, affirm the following under the penalties of perjury:

That on June 29, 2007, I served a true copy of the within documents on (he following parties by first class mail to the following addresses and locations:

The Honorable Alberlo Gonzales
United States Department of Justice
Office of Immigration Litigation, Civil Division
Ben Franklin Station, P.O. Box 878
Washington, D.C. 20044

Dated: June 29, 2007
New York, New York

/s/Charles Christophe
Charles Christophe, Esq.

CHRISTOPHE & ASSOCIATES, P.C.
2 Wall Street, 8th Floor
New York, NY 10005
344-3800
Attorneys for Petitioner

AFFIRMATION OF SERVICE

I, Charles Christophe, Esq., an attorney admitted to practice law in the U.S. Court of Appeals for the Second Circuit, affirm the following under the penalties of perjury:

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Settlement Counsel
United States Court of Appeals
For the First Circuit
Civil Appeals Management Program
1 Courthouse Way, Suite 3440
Boston, MA 02210

Dated: June 29,2007
New York, New York

/s/Charles Christophe
Charles Christophe, Esq.

CIIRISTOPHE & ASSOCIATES, P.C.
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Attorneys for Petitioner